United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1235

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ABDON ACEVEDO, et al.,

Appellants,

-v-

NASSAU COUNTY, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS*

STATEMENT OF THE CASE

At issue in this lawsuit is the determination by appellee Nassau County to reverse long standing plans to include low income housing for families in the development of a County-

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* In this brief the symbol "a" refers to the Appendix;"P's Ex." refers to plaintiffs' exhibit; "D's Ex." refers to defendant Nassau County's exhibit; and "Tr" refers to the original trial transcript.

owned tract of land known as Mitchel Field, thereby depriving Black and Spanish-speaking, low and moderate-income families in the County of housing opportunities which they sorely need. Also at issue is the determination by appellee General Services Administration to pursue plans for a major federal office building at Mitchel Field despite the reversal in County plans and in the face of fully articulated federal policy requiring it to insure equal housing opportunities near all of its facilities.

Appellants are individuals representing the class of low-income minority citizens in need of housing they can afford, as well as the Long Island Region NAACP and the Baldwin Council for Human Rights. Appellees include Nassau County; Ralph G. Caso, County Executive; and the Board of Supervisors of the County whose determination to eliminate housing from plans for Mitchel Field immediately upon their election to office is challenged herein. The Town of Hempstead and the Town Board are also appellees. Challenged is their refusal to permit any low-income housing other than senior citizen housing at Mitchel Field. Additionally, the General Services Administration (hereinafter GSA) is an appellee.

The complaint was filed in the United States District Court for the Eastern District of New York in March, 1972 [1a-53a]. It was alleged inter alia that Nassau County's action in reversing plans to build low-income family housing at Mitchel Field was discriminatory and had the purpose and effect of depriving appellants

of equal protection of the laws and rights secured under the Federal Fair Housing Law and other civil rights statutes. It also was alleged that the Town of Hempstead's refusal to permit construction of low-income family housing at this site violates the same provisions. Finally, it was alleged that GSA had violated the Executive Order on Site Selection (E.O. 11512) and the affirmative action provisions of the Federal Fair Housing Law.

The District Court on May 18, 1973, certified that this action could be maintained as a class action on behalf of "all Black or Spanish speaking persons residing or seeking to reside in said County who are eligible for low income housing as defined in state or federal statutes and regulations." [87a-92a].

Trial of this matter was held in June and July, 1973 before the Honorable Mark A. Costantino. In an effort to maintain the status quo pending a decision on the merits, appellants sought and obtained a preliminary injunction enjoining the defendants from proceeding with the development of a recreation area in the center of Mitchel Field [97a, fn.1].

On January 30, 1974, the District Court issued its opinion dismissing the complaint in all respects [93a-113a]. Although the Court found that reversal of plans to construct low-cost family housing at Mitchel Field was "in large part a result of public opposition" which had been racially motivated [106a]

and that low-income family housing in Nassau County is primarily occupied by Blacks [106a], nevertheless, the Court concluded that there was no showing of "invidious discrimination " [112a] and, with respect to the equal protection claims, applied a rational basis test in evaluating the appellees' asserted justifications for removing housing from the Mitchel Field plans [112a]. The Court ruled that GSA had complied with the relevant federal laws on site selection [112a].

Final judgment for the defendants was entered on February 5, 1974 [114a]. On February 12, 1974, the District Court granted appellants' motion for leave to appeal in forma pauperis [127a]. Notice of Appeal was filed February 13, 1974 [115a].

On February 26, 1974, this Court (per Kaufman, C.J., Feinberg and Mulligan, J.J.) granted appellants' motion for an injunction pending the outcome of this appeal; the injunction bans Nassau County from undertaking further development of Mitchel Field. At the same time, this Court accelerated the appeal.

STATEMENT OF THE FACTS

In 1970, appellee Ralph G. Caso was elected County Executive of Nassau County. Previously, as Hempstead Town Supervisor, he had supported the development of scatter-site, low-income family housing and had called for such housing at Mitchel Field. However, housing and, particularly, housing for low-income

minority citizens, became an issue in the 1970 campaign and Caso took a stand against it [429a]. Upon his subsequent election to office, County Executive Caso reversed all prior plans which called for the development of low-income family housing at Mitchel Field. He dissolved the Mitchel Field Development Corporation, a non-profit corporation which had previously been created by the County to develop Mitchel Field and which had adopted plans calling for significant amounts of housing at the Field, and announced that henceforth no plan for the development of Mitchel Field would include housing [437a-440a]. The record below focuses on the circumstances and impact of this series of events.

Housing at Mitchel Field

In November 1960, the United States Air Force announced that it was about to terminate its operations at the Mitchel Field Air Force Base located in the heart of Nassau County, and in July, 1961, GSA announced that 1122 acres of land at Mitchel Field were surplus to the needs of the federal government [196a-197a]. Nassau County determined to acquire as much of the Field as it could and initiated steps toward that end even before the land was declared surplus. A certain portion of the land was acquired specifically for Nassau County Community College and Hofstra University and was deeded to the County for that purpose at less than fair market value [729a]. Additional land, e.g., 435 acres

purchased in 1963, was acquired at fair market value, free of any deed restrictions [731a, 732a; P's Ex. 12].

During the course of this initial acquisition period, a bi-partisan citizens committee, the Mitchel Field Planning Committee, appointed by then County Executive Eugene Nickerson, prepared plans for the overall development of the Field [203a-204a]. The goal of the Committee and of the County Executive was to build a lively center for Nassau County with a variety of uses which would meet many County needs and which would create a focal point for County activity [204a; P's Ex. 9].

The County prepared a comprehensive plan for the development of the Field in response to a request from GSA which was seeking to dispose of an additional 191 acres [166a-171a; 200a-201a]. Noting the need for multi-family housing in the County, the plan, entitled "Nassau Center",* stated that about 10,000 apartment units should be an integral part of the Mitchel Field development [P's Ex. 9]. The "Nassau Center" plan was adopted by the Mitchel Field Planning Committee and forwarded to the County Board of Supervisors. The Board, in turn, authorized the County Executive to file this report with GSA [202a-205a; P's Ex. 9].

The Town of Hempstead also sought to purchase the 191

*That Mitchel Field should serve as the focus for development of a center in Nassau County was also the recommendation of the prestigious Regional Plan Association (RPA), which, in its report, "A Center for the Suburbs", recommended substantial apartment development in the area [569a; P's Ex. 52.]

acres. With the active public support of then Presiding Supervisor Caso, the Town Board approved an application which was submitted to GSA [334a; P's Exs. 24-26, 28]. That application, after citing the "substantial" and "well documented" need for apartment units in the Town and the "continuous pressure for apartment construction in single-family residential areas where they are not compatible with existing land uses," proposed that 58 acres be devoted to approximately 1200 units of multiple-dwelling housing. The application specifically noted that Mitchel Field "would be ideal for such housing [because it would be] close to educational and recreational facilities, transportation and shopping" [P's Ex. 29, p. 5]. Caso stated in a press release on this application that low-income housing units, to be built either by the Town's Housing Authority or by non-profit corporate sponsors, would be part of the residential development [P's Ex. 28].

GSA determined to sell the 191 acres to Nassau County. This transaction was finalized in 1968 [P's Ex. 19].

In 1968, then County Executive Nickerson sought to insulate decisions concerning Mitchel Field from political pressures and considerations. With the approval of the Board of Supervisors, the Town of Hempstead and Caso, Nickerson established a non-partisan independent corporation to plan for and oversee development of the Field. This body was called the Mitchel Field Development Corporation (hereinafter MFDC). Its board was comprised of nine members,

six appointed by the County Executive with approval of the Nassau Board of Supervisors, and three by the Town of Hempstead. Nickerson's appointments to the Board were bi-partisan and included the most distinguished citizens in Nassau County [205a-206a]. MFDC's mandate was "to recommend a definitive plan for the development of the County-owned lands at Mitchel Field and to assist in its implementation" [759a]. The Board of Supervisors provided the funds to support the corporation's work [209a].

After working with its professional consultants, Marcom, Inc., the MFDC Board adopted a plan for the development of the Field. This plan, entitled "Nassau Center-March 1969", specifically proposed inclusion of 1700 units of housing in the first phase of development at the Field. That housing was intended to include different income groups in a vertical mix - i.e., low, middle and upper income families would all live in the same apartment buildings [761a]. The plan adopted by MFDC projected that of the 576 acres of land to be developed by the Corporation, 250 acres ultimately would be devoted to residential uses. Of the residential uses, a total of at least 1200 apartments would be reserved for low and middle-income residents* [761a].

Following release of the March 1969 report, MFDC held

*The MFDC "Nassau Center" report stated that buildings would occupy less than 10% of the land. It proposed research and office uses and a cultural area as well as housing for the area [760a]. MFDC emphasized the importance of "planned development" and stated that its report "embodies a plan for immediate development, as well as a perspective of the long-range goals to be realized." [758a].

a series of public meetings to assess public reaction to the proposed development [635a-636a]. Two afternoon meetings (May 23 and May 28) and one evening meeting (May 26) were held. The evening meeting attracted an overflow crowd at the Nassau Community College located at Mitchel Field. More than 500 persons, almost all of whom were white, were in attendance. The reaction to the housing proposals was unmistakably and vociferously negative [639a-641a]. The meeting was particularly unruly and Daniel Sweeney, Chairman of MFDC, who presided, had difficulty maintaining order [638aa]. A representative of the Regional Plan Association, which favored housing at Mitchel Field, was prevented from completing his presentation by the crowd [580a-581a].

In its report to the County Executive, Board of Supervisors and Town Board, assessing these public hearings, MFDC noted that "without any question, the strongest opposition [from the public] was to low and middle income housing" [772a]. In reponse to community opposition, MFDC felt constrained to recommend that housing not be constructed at Mitchel Field until after development of some income-producing properties on the land [771a]. In October, 1970, MFDC once again publicly reaffirmed its commitment to housing at Mitchel Field [767a]. Its report stated that "any impact from housing on the local school district would be ameliorated through the increasing tax base created by the development of other structures as well as the effects created through the pattern of declining school population witnessed within

the last few years." [P's Ex. 58, p. 4].

MFDC's proposals for low-income family housing at Mitchel Field sought to implement earlier recommendations by the Nassau-Suffolk Regional Planning Board (hereinafter Bi-County Board). The Bi-County Board had been created in 1965 by joint action of the Suffolk and Nassau County Legislatures expressly to prepare a comprehensive plan for the two counties [131a]. Preparation of the plan took four years, was funded primarily by the federal government and culminated in a summary plan with 25 volumes of underlying reports and analyses [131a-135a; P's Ex. 1]. The Bi-County plan singled out Mitchel Field in its discussion of appropriate land uses in the area and recommended that apartments be built there [P's Ex. 1].

Nickerson, when County Executive, strongly endorsed the proposals of the Bi-County Board and MFDC to include housing at Mitchel Field. Nickerson testified at trial that he adopted that position because he was aware of the "tremendous need" for apartment housing in the County which could not be met by attempting to interject new units into existing neighborhoods where the political opposition would be most vehement. He testified that he had therefore concluded that the "greatest opportunity" to build such housing was at Mitchel Field which was relatively isolated from existing neighborhoods and that he had specifically endorsed the concept of creating a mix of housing opportunities, low, middle

and upper-income units at Mitchel Field [211a-216a; 220a].

Even as MFDC was pursuing its plans for housing at Mitchel Field, a series of events occurred which dramatized both the need for low-income family housing and the tremendous community opposition to such housing at Mitchel Field.

In the fall and winter of 1969 approximately fifteen families who were on welfare and who had been living in cramped and totally inadequate quarters in motel rooms, moved into some vacant barracks in the northwest corner of Mitchel Field. The units, which were in a complex known as Mitchel Gardens, previously had provided housing for families of military personnel. Almost all of those who moved into Mitchel Gardens were Black and all were extremely poor. These families had been housed in "welfare motels" for lack of any suitable alternative housing in the County [232a-234a]. County officials, recognizing the abhorrent conditions of the motels, did not attempt to evict those involved and, in fact, provided supplies and assistance in an attempt to rehabilitate the units. The County concluded that Mitchel Gardens should serve as a temporary answer to the housing problem [233a-234a].

Considerable and vigorous community opposition developed to the continued residency of the welfare families at Mitchel Gardens. This opposition was most vehement from residents of the Uniondale School District in which Mitchel Gardens was located. The Uniondale residents first sought to force the County to remove

the welfare families from the units and then subsequently refused to permit the welfare children, most of whom were Black, to attend the Uniondale public school. The welfare families were forced to initiate a lawsuit to secure the enrollment of their children (about 25 in all) in the Uniondale District. On September 3, 1970 a New York State Supreme Court ruled that the exclusionary policy was illegal and ordered the admission of the students. Vaughn v. Board of Education of Union Free School District No. 2, Town of Hempstead, 314 N.Y. Supp. 266 (1970) [232a-234a].

A Reversal of Policy

Housing at Mitchel Field constituted a "primary" or "key" issue of the 1970 campaign for County Executive [339a-341a], and candidate Caso, who, in 1966, had endorsed 1200 units of housing at Mitchel Field, announced during his campaign that he favored excluding all housing from the site [322a-326a, 405a-408a]. At trial, Caso testified that his new position on housing "certainly jelled in 1970, at the time that I was running successfully for the office of County Executive." [406a]. At that time Caso believed that the majority of the Nassau residents, and especially those residing in the Uniondale and East Meadow School Districts which border Mitchel Field, opposed all housing at Mitchel Field [407a-409a].

Caso also campaigned in opposition to the continued presence of welfare families at Mitchel Gardens [432a]. This, too,

constituted a reversal of an earlier Caso position taken before the Uniondale residents called for the removal of the welfare families. In 1967, Caso had endorsed the use of units at Mitchel Gardens to house welfare recipients in order to avoid placing welfare families in motels [418a-419a].

Caso assumed office in January, 1971 [306a]; one of his first official acts was to dissolve MFDC, transfer responsibility for Mitchel Field development to the County Commissioner of Commerce and Industry, and publicly state that no housing would be built at Mitchel Field [438a-439a].

Notwithstanding dissolution of MFDC and public announcement that housing development would henceforth be removed from all plans for Mitchel Field, the professionals and public bodies charged with the task of planning the area continued to stress the need for and importance of housing. MFDC had retained the planning services of Henry C.K. Liu of Liu Urban Design Associates (hereinafter Liu) in 1969. Liu had been commissioned to prepare an initial design concept for development at the Field. Liu's work was completed and delivered to the County in January, 1971.

Liu's report designated particular sites for housing on Mitchel Field and stressed the important of housing in the area's development [P's Exs. 21,22,23]. Liu's report stated that "from a planning point of view, housing is considered as one of the necessary land uses at Nassau Center [Mitchel Field] if a balanced

and truly vital center is to be achieved." Liu recommended that from a planning point of view "housing needs to be a part of Nassau Center, from both the view of the needs of the county and the type of environment that housing creates in the project." [389a,394aa]. The Liu report also noted that "political decisions external to purely planning considerations may govern in this issue." [P's Ex. 23, Memo No. 57, p.5].

In December 1971, Nassau County's own Planning Commission, in the first comprehensive development plan ever prepared for the County, recommended that 9,400 units of housing be constructed at Mitchel Field [179a, 753a].

The Nassau County plan noted that every report which had ever been prepared on the future of Mitchel Field had proposed inclusion of housing opportunities. The report also remarked upon the strong opposition engendered by proposals for housing at Mitchel Field, stating:

> "The proposals put forth by the Marcom studies (the only plan that has received any widespread publicity) were strongly opposed by some residents in the adjoining communities - Uniondale and East Meadow. They objected to the height of the proposed structures and to housing of any kind. Basically, the objection relied on the belief that a great majority of the housing constructed at Mitchel Field would be low income, thus affecting the racial balance of the Uniondale School District." [752a]

The County's Current Plans for Mitchel Field

Notwithstanding its rejection of the housing elements of the Liu report, the County in November 1971 re-negotiated a contract with Liu to perform planning tasks relating to Mitchel Field on an ad hoc "per assignment" basis [376a]. No attempt has been made, however, to engage in a comprehensive planning process for the development of the Field. And the County continues to refer to the Liu report as the basic outline for the development of Mitchel Field [354a]. Caso, following through on his election pledge, remains unalterably opposed to housing of any type at Mitchel Field [395a-399a,405a] and continues to exercise complete authority in determining what will be developed there [366a].

According to Caso, there are plans in various stages of maturity to include the following uses on the Field: central reference library; recital hall; hotel; park; complex for the handicapped; "some form of technical and trade high school"; police precinct; bus facility; firehouse; senior citizen housing and commercial and industrial development in the so-called Santini area; commercial development on the turnpike; and a conservation area [309a-313a]. To date, the only facility constructed on that part of Mitchel Field which is the subject of this lawsuit has been the Veterans Memorial Coliseum.*

*At no time have appellants challenged the development of facilities for Nassau Community College and Hofstra University, both of which are located on land which formerly constituted part of the Mitchel Field Air Force Base.

The Santini area* of Mitchel Field has been designated by the County as a site for senior citizen housing development to be constructed by the Hempstead Housing Authority. This development is proposed for 250 units on 10.5 acres. Both the Hempstead Housing Authority and the Hempstead Town government, including the Presiding Supervisor, have endorsed the proposal.

The project has not progressed, however, because the federal Department of Housing and Urban Development (HUD), which funds public housing projects, determined in 1972 that construction of additional senior citizen housing in the Town of Hempstead would be in violation of the Federal Fair Housing Act of 1968. HUD noted that while the Town wished to construct senior citizen housing, it refused to build public housing for families on a scatter-site, dispersed basis [538a]. As the Regional Administrator testified, HUD was sensitive to a potential Fair Housing Act violation because residents of senior citizen housing are almost exclusively white while residents of publicly assisted family housing are almost exclusively Black [531a]. See discussion, p. 20, infra.

* The Santini section is detached from most of Mitchel Field, located south of the main tract and immediately across Hempstead Turnpike.

Community Opposition to Publicly Assisted Family Housing

The District Court found that "Public housing has been objected to because of the loss of revenue it causes and the increased burdens it places on the community's resources. By far, however, the most objectionable form of housing has been low-income family housing. It is clear from all the evidence that "community opposition to this form of housing has been racially motivated." The district court also found that low-income family housing is predominantly Black and that proposals for construction of such housing have incurred vehement community opposition -- opposition that has already blocked several such project proposals [107a]. Finally, the District Court stated that "Future proposals are sure to take into consideration the strong feelings of the residents of Nassau County" [107a].

These findings are amply justified by the record which establishes that all efforts to build low cost family housing in Nassau and the Town of Hempstead have encountered strong opposition and protest. [See generally, 211a-212a; 231a-234a; 410a-416a; 772a-773a]. Indeed, Hempstead Presiding Supervisor Purcell, who has held public office in Nassau County for more than 20 years, testified with respect to proposals for construction of scatter-site public housing in

Hempstead that "In all my years as a political leader and as an elected official, no subject ever caused as quick a reaction in a community as that particular subject did." [656a].

The dramatic retreat by public officials from a scatter-site housing proposal in Hempstead in the face of strong local opposition to the program indicates the extent of official reluctance to pursue policies which encounter opposition. In 1970, the Town of Hempstead Housing Authority developed plans for locating 700 units of public housing on sites scattered throughout the Town [P's Ex. 33, 483a]. More than 600 of these units were to have been for families [521a]. Potential sites were inspected and evaluated by the Housing Authority and the 17 most feasible sites were selected for construction. A potential builder was available for each project [521a-522a].

In early 1971, the Housing Authority held an informational meeting for the local community concerning the first site on which it planned to proceed [489a]. The site was located on half an acre in North Bellmore and entailed the construction of just ten residential units [487a-489a; 502a]. The Housing Authority planned a meeting only with the League of Women Voters and several other community leaders [489a]. However, so many residents expressed a desire to state their opposition to the proposal, that the meeting was opened to

the general public [490a]. Speakers were interrupted [490a]. The meeting was loud. There was shouting, and people conducting the meeting lost control. Opposition to the proposal was vehement [493a-494a]. The audience accused the Housing Authority of "trying to break up the area with low income housing ..." [490a].

After the North Bellmore meeting, the builder withdrew his proposal, citing the opposition to the ten units of housing [494a]. Mail, which was 99-1/2% in opposition to the project, poured into the Presiding Supervisor's office [656a-657a]. The scatter-site program was abandoned [657a]. When, in Woodmere, there later was a rumor that a public housing project would be proposed in that area, Presiding Supervisor Purcell specifically went to a large community meeting and assured local residents that no scatter-site housing would be placed in their neighborhood as long as he was in office [657a-658a].

Efforts to build low-income family housing have encountered similar opposition elsewhere in the County. When low-income housing was proposed as part of the renewal of the Hicksville central business district, "all hell broke loose." [287aa-287ba].

Although it abandoned the scatter-site family housing proposal, the Town of Hempstead has continued to press for the development

of public housing for the elderly [497a, 537a, 660a, 666a]. The Town officials, as well as the citizenry, know that residents of public housing for the elderly are predominantly white and that residents of public housing for families are predominantly Black [663a-664a]. Thus in the summer of 1972, the clientele of public housing for the elderly in the Town of Hempstead was approximately 3% minority [531a]. Presently only 14 of the 1079 units of elderly housing in the Town are inhabited by Blacks, while 77 of the 80 family units are lived in by Black families [P's Ex. 32]. S. William Green, Regional Administrator of HUD, testified that "racial fears" are involved in the preference for senior citizen housing over housing for families [553a-555a].

When the Town of Hempstead refused to accept publicly assisted family housing outside areas of minority concentration, the Regional Administrator found it necessary to withhold HUD funding for the 250 senior citizen housing units slated for Mitchel Field [537a,542a]. The Regional Administrator expressly noted that while the Town of Hempstead vigorously opposed public housing for families in most of the Town, it had "been willing to grant tax abatement for family housing when that housing was located in the area of minority concentration." [547a, 548a].

The racial animus of the communities surrounding Mitchel Field was vividly displayed in the Mitchel Garden controversy,

the history of which has already been set forth. Critical to an appreciation of the racial implications of this controversy is the fact that Mitchel Gardens was located in the Uniondale School District. Uniondale itself is 8.7% Black [P's Ex. 4, p. 34]; the school district is 18.8% Black [713a]. Residents of the school district are concerned with maintaining its "racial balance", as has been noted by the Nassau County Planning Commission [752a]. The Black population of Uniondale, concentrated in the southeast corner of the community, [715a-716a], nearly doubled during the last decade [P's Ex. 4, pp. 34-35]. When the welfare families residing at Mitchel Gardens sought to register their children for school, the Uniondale schools turned them away. Former County Executive Nickerson testified "there was considerable agitation to get us to throw the public assistance recipients out of Mitchel Gardens, because those children, mostly black children, would go to school in the Uniondale school district" [232a]. The families were ultimately forced out of their homes by a combination of community opposition and official County policy. Mitchel Gardens has now been demolished.

Strong opposition to low-income housing at Mitchel Field has also come from East Meadow, the other school district in which the Field is located [183a-184a, 344a]. East Meadow's population is only 1.3% Black [P's Ex. 4, p. 32].

The Bi-County Board's recommendation for construction of a

substantial number of publicly assisted housing units and specifically for housing at Mitchel Field also met with substantial racially-motivated, local opposition, especially from East Meadow and Uniondale residents. Arthur Kunz, Deputy Director of the Board, testified that he attended more than 100 meetings of civic and educational organizations to discuss the Bi-County Plan and was continually confronted by opposition to the housing proposals [183a-185a; 286a-287a]. Throughout the Uniondale School District, the argument was made that "the community already had significant non-white population and that they did not want to unbalance that particular situation." [185a].

Racial Segregation and the Housing Problem in Nassau County

Nassau County is highly segregated. In addition, its Black population is concentrated in areas of substandard, deteriorating housing. In 1970, the total population of Nassau County was 1,427,838, of whom 65,679 were Black. Blacks represented only 4.6% of the total population of the County [P's Ex. 4].

Although the Black population has increased somewhat in the last decade, that increase has not been spread equally throughout the County. Rather, the increase was in those areas that had experienced Black concentrations in earlier years [156a-158a; P's Ex. 4, p. 18, Tables 10, 11 and 32]. Thus, the Bi-County Board reported that"between 1960 and 1970, the pattern of Negro settlement became one of increasing concentration in those communities that had substantial numbers of Negro residents at the beginning of the decade. The number of cities, villages and unincorporated places

with 1,000 or more Negroes increased from 10 to 13 in Nassau, while the share of the county-wide Negro population living in these communities rose from 66.4% to 82.5%." [P's Ex. 4, p. 17]. More than two thirds of all the Blacks live in only 10 out of a total of 125 communities in the County [262a].

The section of Nassau County in which Mitchel Field is located is not one of minority concentration; rather, the immediately surrounding communities of East Meadow and Uniondale have predominantly white populations, 98% and 91% white, respectively. It should be noted that there is a clearly erroneous factual error in the District Court's opinion. Uniondale's population is not 18% Black, as stated by the Court [111a]; rather, it is 8.7% Black [168a; P's Ex. 4]. Moreover, those Blacks who live in Uniondale are concentrated in the southeast section of the Village, removed from Mitchel Field [263a; 1338a].

There is a distinct positive correlation between the segregated racial enclaves of the County and those areas containing what may be called "pockets of poverty" [266a-268a]. Therefore, in Nassau County, an examination of the problems of the poor is in large degree also an examination of the problems of racial minorities. While Blacks comprise only 4.6% of the total population of Nassau County, almost half of the people on the welfare rolls in the County are Black [347a]. The Bi-County Board has stated that, "in Nassau, the proportion of the Negro families that reported incomes of less than $5,000 was three times as great as the corresponding proportion of all families." [P's Ex. 8, p. 33].

While most residents of Nassau County live in well maintained homes, the poor, and in particular members of minority groups, still suffer severe housing problems. These facts led the Bi-County Board to conclude: "Housing problems for non-whites result from poverty and discrimination; non-whites are significantly more limited in their housing choices than whites. The result is segregation, and it is getting worse." [743a].

In 1970, a field survey by the Bi-County Board identified serious housing deficiencies in 13 communities and catalogued approximately 13,000 units which it considered deficient. The Board also observed that a highly disproportionate number of non-whites lived in those units [144a-146a; P's Ex. 21, p. 28]. In its report, the Board wrote that "housing occupied by non-whites was found to be in poorer condition and more over-crowded than that occupied by whites. Non-whites were also found to pay more for their housing." [747a].

The housing problem confronted by minority residents of Nassau is exacerbated by an extreme housing shortage and particularly by the Town and County's refusal to permit construction of publicly assisted housing. This housing shortage is evidenced by a County vacancy rate of 0.8% [P's Ex. 10, pp. 134-35]. Furthermore, housing costs are climbing at an alarming rate, placing the poor virtually outside the

market* [165a]. According to the 1970 Census of Housing, rentals in Nassau County were the highest in the New York-New Jersey-Connecticut region [P's Ex. 10, p. 135, Table 36].

The most conservative estimate, determined by the Bi-County Board and confirmed by the Nassau County Planning Commission, is that 62,500 additional multi-family units must be developed in Nassau County by 1985 if the County is to meet the demand for housing which will arise within its own borders [P's Ex. 7; P's Ex. 10, p. xiii].

The Failure to Permit Publicly Assisted Family Housing

Bi-County emphasized that a substantial portion of the 62,500 apartments needed in the County would have to be publicly funded in order to meet the needs of the poor and called for 21,500 of those units to be built immediately [P's Ex. 10, p. 152]. In fact, as of May 1973, only 4,258 units of public or publicly assisted housing existed in all of Nassau County [P's Ex. 40].

*The median value of an owner-occupied unit in Nassau County increased from $18,000 in 1960 to $30,200 in 1970, an increase of 67% [165a]. In the decade 1960-1970, median contract rentals rose from $95 a month, also a 67% increase [165a-166a]. This was more than 25% higher than the Consumer Price Index rise for the same period [P's Ex. 10, p. 134].

The record establishes that the County and Town presently are doing little to bring about development of low cost family housing which the District Court found to be housing predominantly for Blacks [106a]. At the present time, the overwhelming majority of the public housing units in Nassau County are restricted to occupancy by non family senior citizens who the Court noted are predominantly white [97a].

Out of a total of 1159 units of public housing constructed by the Town of Hempstead Housing Authority, 1079 are for the elderly [475a; P's Ex. 32]. This pattern holds true for all the housing authorities in the County [P's Ex. 44-51].

The Town of Hempstead does not even know how much housing it needs. To estimate need, the local Housing Authority relies only on the applications for housing which it receives [475a]. Yet, the Housing Authority itself has recognized that the applications on file are not indicative of the need [P's Ex. 35, pp. 3-47]. In addition, it should be noted that there are only 80 units of public housing for families in the Town and that the Director of the Housing Authority herself testified that "80 low income units were specifically designed as a relocation resource for the Inwood urban [renewal] project, and with only those units available as compared with more than a thousand units of elderly housing, naturally the public knows there aren't many

units and they know the Town had been opposed to building additional units, so there wouldn't be much point in applying for what everyone knows doesn't exist."[551a].

Public officials are wary of meeting the family housing need of the County with proposals calling for multi-family development. The Nassau County Comprehensive Plan states: "Even a modest plan for the building of some 700 units on sites scattered throughout the Town of Hempstead has been discarded. Multi-family housing has been deleted from a proposal to redevelop Hicksville's Central Business District. Housing has been eliminated from the projected development of Mitchel Field. Thus, the housing crisis becomes more critical day by day." [P's Ex. 10, p. xiii].

The Availability of Vacant Land

The potential to develop low cost family housing always depends upon the availability of suitable vacant parcels of land, adequately zoned for multi-family construction and having a cost low enough to be compatible with this type of development. A dwindling land supply obviously affects all of these factors.

The record here shows that Nassau County faces a serious problem as the result of a decreasing supply of vacant land. "The large tracts of land that were available in the

postwar period and the 1950's have all but disappeared. The cost and expense of assembling property has been a factor in the building slowdown." [P's Ex. 10, p. 128]. In the Bi-County Comprehensive Plan published in July 1970, the extent of the remaining vacant land in the County was estimated at approximately 15,000 acres. By the time the Nassau County Comprehensive Plan was published, in December of 1971, the figure for vacant land had dwindled to approximately 12,500 acres [P's Ex. 10, p. 127]. Moreover, in excess of one third of that vacant land is located in the North Shore area [P's Ex. 10, p. 125], outside the proposed corridor of high density development where the Bi-County Board stated multi-family development would be appropriate. That land would be better used to meet the open space needs of the County [245a-247a; P's Ex. 1].

Presently, there are less than 10,000 acres of vacant land left in the entire County [188a]. Approximately half of this land, or 5,000 acres, is located in the North Shore estate area which is zoned for low density housing on one acre or more and much of which is needed for recreational or institutional purposes. The Bi-County Board recommended that this land remain zoned for low density development, finding that because this area is removed from the center of the County and from public transportation and services, it is not suitable for multi-family development and certainly is

unsuitable for low cost housing efforts [245a-255a]. Another 1,000 acres are sand pits, presently unavailable for development [191a]. Another 500 acres are zoned for non-residential uses [191a], and 500 acres are at Mitchel Field. The other vacant land is scattered in small parcels throughout the County [257a-259a].

This picture led a representative of the Bi-County Board to testify that because there is so little vacant land in the County, "parcels are at premium price so new housing is very, very expensive" [180a].

Similarly, the Nassau Planning Commission in its December 1971 Comprehensive Plan lamented the high cost of housing which flowed from a growing housing shortage and stressed the need for 62,500 new apartments. In 1968 that Commission estimated that using all available land it was theoretically possible to develop a maximum of only one-third or 24,000 of those needed units in the County [P's Ex. 10, p. 153].*

*It should be noted that the Commission only found that it was theoretically possible to construct the 24,000 units. Numerous factors make accomplishment of that goal quite dubious. Foremost, a large portion of the suggested 24,000 units would have to be built on already developed land zoned for apartments in the older central business districts of the County, but with far more intense development of land presently occupied by apartments or one-story retail establishments [1432a]. A substantial amount of urban renewal redevelopment dislocation and relocation would be involved, thereby displacing large numbers of poor people and minority families [239a; 288a-289a].

The County's Asserted Justifications for Reversing Plans for Housing at Mitchel Field

According to appellee Caso, his basic reason for determining to reverse the plans for housing at Mitchel Field was that the "contemplation of the County in acquiring the property was for civic, cultural and educational purposes" [320a], and that housing would be incompatible with those uses [320-321a].

In the course of the trial, the County sought to justify the reversal on several additional grounds. Those justifications most heavily relied upon include the following: (1) development of housing, particularly low-income housing at Mitchel Field, is opposed by the local school districts which claim they will suffer a financial burden if required to educate additional school children; (2) low-cost housing can be built elsewhere in Nassau County so it need not be built at Mitchel Field; and (3) the housing will be in high-rise buildings which are undesirable [369a-370a].

a) The Civic, Education, Cultural Claim

The County claims that Mitchel Field was acquired for civic, educational and cultural purposes, thereby necessitating exclusion of housing. Nonetheless, the County has found no problem in committing land for senior citizen housing in the Santini section nor in planning for substantial commercial and industrial development. The application to GSA for the initial purchase of 435 acres did

state that the County anticipated using the land for civic, educational and cultural purposes. This resolution was, however, part of an effort to purchase the land at a "public benefit" discount and the proposed uses reflected the County's desire to obtain the discount; the designation did not represent an assessment of the most appropriate, important or desirable utilizations of the land [Tr. 264].

For a variety of reasons, GSA refused to sell the parcel at a discount and the County ultimately purchased the 435 acres at market value and without any restrictions on its use. The County is free to develop almost all of Mitchel Field as it sees fit [731a].

In terms of the compatibility of housing with other uses now planned for Mitchel Field, with the exception of the present County administration, all of the professionals and public bodies who have studied the matter (Liu, MFDC, Nassau Planning Commission, etc.) strongly endorsed housing at Mitchel Field.

b) Claims of The Fiscal Impact On School Districts

At trial, local officials from the Uniondale and East Meadow school districts expressed concern that provision of housing at Mitchel Field would have a severe impact on their local tax rates. The record shows, however, that these officials see development at Mitchel Field as providing them with rateables which will lower the

current tax rates in their districts. They oppose housing at the Field because, at worst, development of housing along with the commercial and industrial rateables will keep the tax rate constant. There is absolutely no evidence in this record that the tax rate, as a result of the inclusion of housing, will increase. It may well decrease [See, e.g., 705a; P's Ex. 10, p. 192].

At present the County's plans for the development of Mitchel Field envision a substantial amount of industrial, commercial and office development [309a-313a]. These uses will constitute significant additions to the tax base of both Uniondale and East Meadow. Given that East Meadow has a rapidly declining school population [720a] and that Uniondale, with the exception of Mitchel Field, is fully developed, this increase in the tax base clearly could be expected to lead to a decrease in the tax rate.

All planning for Mitchel Field has provided for both housing and office and commercial space in the expectation that the non-residential uses would pay for - or even more than pay for - all services required by residents at Mitchel Field, including the cost of educating the children living there [P's Exs. 9, 14, 21, 22, 23, and 21]. Significantly, the Nassau County Planning Commission, while recommending 9,400 housing units at the Field, projected that taxes generated by development there would more than cover the cost of educating the children [P's Ex. 10, p. 192]. The Commission, in fact, suggested that the substantial revenues from Mitchel Field

should be shared by the entire County, not just the local taxing entities [P's Ex. 10, pp. 190-192].

Furthermore, the Uniondale School District is currently one of the wealthiest in New York State and, therefore, receives only minimum state educational grants [703a]. The relative wealth of Uniondale is reflected in the fact that at the time of trial its gross per pupil expenditure was $2,239, one of the highest in the County [709a-710a]. Even with this high per pupil expenditure, Uniondale has only a middle-range tax rate, as compared with other districts in the County [704a-705a].*

East Meadow is in the anomalous position for a suburban school district of experiencing a substantial and dramatic decline in its school population. That population dropped from 18,500 in the school year 1964-1965 to an anticipated enrollment of 13,350 for the 1973-1974 school year [720a]. This trend led to the decision to close a school; thus, East Meadow already has the physical plant to meet the needs of any school children residing in that section of Mitchel Field which is located in the East Meadow School District [720a]. However, under Nassau's plans for Mitchel Field, only senior citizen housing - which, by definition, generates no school children - is to be constructed on that section of the Field.

Neither East Meadow nor Uniondale presently has any

*The Uniondale district is the beneficiary of such substantial income-producing rateables as Roosevelt Raceway, Roosevelt Field Shopping Center and substantial industrial development along Stewart Avenue [703a-704a].

subsidized low-cost family housing [Tr. 1311].

c) The Claim That Mitchel Field Is Not Needed To Solve The County's Housing Problem

The County's claim that Mitchel Field need not be devoted to housing because other parcels are available in the County is based on the 1968 projection by the Nassau County Planning Commission that, theoretically, 24,000 units of multi-family housing could be built in Nassau [See p. 29, supra]. The record in this matter clearly establishes that as of the time of trial, the County did not even know how much of the land relied on for the 24,000 unit projection had since become unavailable [Tr. 1459-1461]. Also, it should be noted that a large portion of the area included in the projection requires the acquisition of land which itself would necessitate programs of condemnation and demolition [Tr. 1423] and result in displacement of those families already residing in these areas. Moreover, to approach the 24,000 unit goal, extremely high density development would be required in certain areas.

Most important, the County owns none of the lands involved in these projections and all plans to build low-cost family housing in these areas have been abandoned. The County does, however, own Mitchel Field.

d) The High-Rise Housing Claims

The record is devoid of any evidence to substantiate the

County's claim that if housing were built at Mitchel Field it would have to be done in high-rise structures or that such structures are inappropriate for the site. In fact, the evidence is to the contrary. The 250 units of senior citizen housing proposed for 10.5 acres in the Santini area of the Field will be in garden type apartments at a density of approximately 25 units an acre.

The County implicitly argues that low-income housing must be high-rise because of land costs at Mitchel Field. Such costs are irrelevant since the County already owns the land and has great flexibility in dealing with it. Noteworthy is the fact that the County found it possible and appropriate to sell the land in the Santini area to the Town of Hempstead Housing Authority for senior citizen housing at the price of $30,000 an acre despite the fact that the land is supposedly valued at $200,000 an acre [680a, Tr. 1382; P's Ex. 41].

The County and the Town's concern with a 100 foot height limitation for all development at Mitchel Field, as supposedly set by the Town of Hempstead Zoning Ordinance, has little credence given that the Town permitted Hofstra University to construct 14 story dormitories [P's Ex. 10, p. 189]. No one has ever proposed that housing of more than 14 stories be constructed at the Field [See, e.g., 774a]. Moreover, Marcom and MFRC were confident that low-income housing could be built on the Field which would conform to the Town of Hempstead height limitation [630a].

Furthermore, the Bi-County Board specifically recommended

that more dense multi-family development be concentrated in the center spine of the County, precisely where Mitchel Field is located [138a-139a, P's Ex.1].

GSA and the Proposed Federal Office Building

At the time GSA announced that certain land at Mitchel Field was surplus to the needs to the federal government, a determination was made to retain other acreage at Mitchel Field for the purpose of constructing a federal office building. GSA has determined to construct a federal office building which will house approximately 2,000 employees, working for about one dozen different federal agencies [698a].*

In the first quarter of 1973, the Commissioner of GSA submitted a Prospectus for the federal office building to the Office of Management and Budget (OMB) for inclusion in the federal budget to be submitted to Congress [690a-691a; 730a]. The Prospectus is a document used to obtain Congressional authority for construction. It is often referred to as a proposed prospectus because it is subject to revision by OMB. GSA, however, has no role in revising the prospectus once it is submitted to OMB; after review by OMB, the prospectus goes directly to the Committee on Public Works of

*The proposed federal office building will be located on Stewart Avenue. GSA originally had retained another parcel of 55 acres on Oak Street for the building, but agreed to exchange that parcel for the Stewart Avenue parcel at the request of Nassau County. This exchange of land was finalized on December 11, 1972 [733a-734a; 738a].

the Congress [690a-691a; 730a].

On February 27, 1969, President Nixon issued Executive Order 11512 which directs that housing needs of prospective federal employees and the general availability of low-income housing be considered as a site selection factor with respect to federal facilities. In 1971, GSA and HUD executed a "Memorandum of Understanding" whereby GSA agreed to consult with HUD concerning the availability of low and moderate-income housing in an area surrounding a proposed site for a federal facility. This Memorandum of Understanding was adopted pursuant to E.O. 11512 and the affirmative action sections of the Federal Fair Housing Act of 1968, 42 U.S.C. 3608 [693a-694a].

It was not until January 1973, at approximately the same time that the Prospectus was submitted to OMB that GSA, acting through its Region II offices in New York City, commenced activities pursuant to E.O. 11512, the Fair Housing Law and the Memorandum of Understanding. At that time, GSA officials met with officials of HUD to discuss procedures for implementing HUD involvement in evaluating the location of the federal facility at Mitchel Field. It was decided that GSA would prepare a questionnaire to be distributed to all federal agencies requesting space in the federal office building in order to determine the number of employees to be housed in the facility, their income levels (GS ratings) and how these persons would travel to work [693a; 699a-700a; P's Ex. 60]. At the time of trial, the findings of this survey apparently had

been forwarded to HUD, but HUD had not taken any action whatsoever to advise, to recommend, to discuss or to propose any actions necessary for compliance with the federal civil rights policies with respect to the selection of sites for federal facilities. Moreover, HUD has not yet even given GSA its evaluation of the availability of low and moderate-income housing in the area surrounding the Mitchel Field site. Nonetheless, GSA, as indicated, has approved the federal facility and has forwarded a Prospectus to OMB and to Congress. GSA's preparation of the Prospectus was completed in the face of Nassau County's determination to exclude low-cost family housing from Mitchel Field, a determination on which GSA has taken no position.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE REVERSAL OF PLANS FOR LOW INCOME FAMILY HOUSING AT MITCHEL FIELD WAS DEVOID OF RACIAL PURPOSE

The District Court applied the wrong legal test in evaluating the reversal of Town and County plans for low-income family housing at Mitchel Field. The Court incorrectly concluded that this decision did not have the purpose or effect of discriminating against appellants because of their race. Thus, the Court failed to strictly scrutinize the asserted justifications for the policy reversal. Instead, it upheld the challenged actions on the grounds that they had a rational basis [111a-112a].

Appellants will establish that the Court's own findings unequivocally demonstrate that the reversal in policy had the effect of denying appellants access to housing on racial grounds. Moreover, appellants will show that the reversal was racially motivated and that the racial purpose "add[s] to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority." Wright v. Council of City of Emporia, 407 U.S. 451 at 461 (1972); Pride v. Community School Board of Brooklyn, 482 F.2d 257 (2nd Cir. 1973).

Where racial discimination may be involved, the motive of the governmental entity necessarily is an appropriate subject of judicial inquiry. See, e.g., Reitman v. Mulkey, 387 U.S. 369, 373 (1967); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960); Griffin v.

County School Board of Prince Edward County, 377 U.S. 218 (1964).

In the context of official local action obstructing plans for the development of housing for low-income minority citizens, this Circuit and others have treated racial motivation as important to a showing of invidious discrimination. Kennedy Park Homes v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970), aff'd, 436 F.2d 108 (2nd Cir. 1970), cert. den., 401 U.S. 1010 (1971); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd per curiam, 457 F.2d 788 (5th Cir. 1972); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257 (N.D. Ohio 1973). In none of these cases have the courts required overt, unambiguous expressions of racial discrimination on the part of officials; rather, they have considered the totality of circumstances to determine whether racial discrimination was an element in the defendant's actions. Dailey v. City of Lawton, supra; Lackawanna, supra.

Proof of a violation in a case of this kind does not depend on an open statement by an official acknowledging an intent to discriminate. Thus, the Court in Dailey v. Lawton, supra, stated:

> The appellants point out that the race issue was not discussed at any of the public meetings and that there was no evidence of racial prejudice on the part of any city official. If proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. In our opinion it is

> enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals. 425 F.2d at 1039.

Those cases in which the courts have found invidious racial motivation have certain common elements. The courts have repeatedly noted the existence of: (1) community opposition, often manifested in large, loud public meetings; (2) evidence that this opposition was racially motivated or focused on concerns which the court recognized as surrogates for racial fears; (3) reversal of public policy in the face of such opposition; and (4) a history of local opposition to similar proposals.

The record below establishes each of these elements and substantiates the findings of the District Court on the issue of racial motivation. "Unquestionably", the Court found, "the decision not to construct housing at Mitchel Field is in large part a result of public opposition." [106a]. The Court also found that "the most objectionable form of housing has been low-income family housing" [106a], and that "in Nassau County low-income family housing is predominantly occupied by Blacks." [106a]. Finally, the Court found that "community opposition to this form of housing has been racially motivated." [106a], and observed:

> As can be expected such heated opposition has not been ignored by the elected officials of Nassau... There is evidence of more than one housing proposal being dropped because of vehement community opposition. Future proposals are sure to take into consideration the strong feelings of the residents of Nassau County. [107a].

In the face of these clear findings, the Court refuses to draw the logical and legally mandated conclusion that Nassau County and Hempstead officials effectuated a racial purpose in excising all plans for low income family housing from Mitchel Field in response to community opposition. Rather, the Court draws the incredible conclusion that there "is no proof of official conduct which has as its purpose the containment of Blacks or which has the effect of denying Blacks rights and opportunities available to whites." [107a].

The lower court's conclusion is contrary to the prevailing view in the federal courts of the operative facts which trigger a finding of racial purpose in cases involving local opposition to low cost housing. See, e.g., Dailey v. Lawton, supra, at 1039. Thus, for example, the Court in Crow v. Brown, supra, found that racially motivated community opposition to public housing had been given effect by the decision of the Commissioners of Fulton County, Georgia, to deny building permits for the construction of two "turnkey" housing projects. The Court's decision was premised on its finding that public officials knew that residents of the new housing would be Black. It stated:

> The Commissioners testified that they were aware that most tenants of public housing are black, and the court is constrained to find that the only objection the county authorities have [to the projects] is that the apartments would be occupied by low-income, black tenants. 332 F. Supp. at 389.

The record reveals that officials of the Town and the County were similarly aware of the fact that residents of low-income family housing were Black when they abandoned the scatter-site housing program and announced that, henceforth, plans for Mitchel Field would include no proposals for low income family housing.

Similarly in Banks v. Perk, 341 F. Supp. 1175 (N. D. Ohio E. D. 1972), aff'd in part and rev'd in part without opin., 473 F.2d 910 (6th Cir. 1973), based its conclusion that official action had been racially motivated, on the finding that revocation of building permits for two public housing projects in white areas of Cleveland followed an election campaign in which the candidates who subsequently assumed office promised to oppose public housing in neighborhoods whose residents opposed such housing. The analogy to appellee Caso's fulfilled campaign pledge to revoke plans and commitments to include housing at Mitchel Field is clear and direct. The only significant distinction between Banks and the instant case, ironically enough, is that Caso is both the progenitor of the now-abandoned scatter-site public housing program for Hempstead and the official who campaigned on a platform opposing low-income family housing. The reversal in policy can only have been a response to the racial fears which the lower court itself found persisted among the local white electorate. Ironically, the District Court cites Caso's scatter-site housing program as evidence of the absence of racial motivation and totally ignores the fact that it is the reversal of that policy which is the subject of this lawsuit.

Lackawanna, supra, is the law in this Circuit on what are the operative facts for imputing the racial motivation of a community to local officials who oppose plans for the development of low-income, minority housing. The District Court in Lackawanna made findings of fact which were virtually identical to those of the lower court in this case and then went on to conclude that rejection of housing by local officials had been racially motivated. In sustaining that conclusion, the Circuit Court, per Mr. Justice Clark, stated:

> This panoply of events indicates state action amounting to specific authorization and continuous encouragement of racial discrimination, if not almost complete racial segregation.
> 436 F.2d at 114.

The District Court in the instant case clearly erred as a matter of law in holding that the official action challenged by the appellants were not racially motivated.

II. THE RECORD BELOW ESTABLISHES THAT THE REVERSAL OF HOUSING PLANS FOR MITCHEL FIELD HAD A RACIALLY DISCRIMINATORY EFFECT

Important though findings of racial motivation may be, it is clear that the critical component of invidious discrimination is impermissible racial effect. The Supreme Court put the issue succinctly in Wright v. City of Emporia, supra, 407 U.S. at 462, when it wrote, "We have focused upon the effect -- not the purpose or motivation... The existence of a permissible purpose cannot sustain an action that has an impermissible effect." See also, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 902, 931 (2d Cir. 1968) in which the Court held that "equal protection of the law means more than merely the absence of governmental action designed to discriminate," and Hawkins v. Town of Shaw, Miss., 437 F.2d 1286, aff'd en banc, 461 F.2d 1171 (5th Cir. 1971).

What is significant about an intent to discriminate is that "where an action... is motivated by a demonstrated discriminatory purpose, the existence of that purpose may add to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority." Wright, supra, at 461.

Thus, where facially neutral actions, such as the reversal of plans for low-income family housing, have demonstrated

racial purposes, the courts have been particularly sensitive in assessing the racial effect of those actions. Reitman v. Mulkey, supra; Gomillion v. Lightfoot, supra.

Racially motivated reversals of public policy in and of themselves raise the inference of unlawful discriminatory effect, necessitating that those officials responsible for the reversal show that their policies are legitimate and necessary. See Dailey v. City of Lawton, supra; Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189, 192 (4th Cir. 1966); Cypress v. Newport News, 375 F.2d 648 (4th Cir. 1967); United States V. Duke, 332 F.2d 259 (5th Cir. 1964); and Louisiana v. United States, 380 U.S. 145 (1965).

In Lackawanna, a low to moderate-income housing development had been excluded from the City's virtually all-white Third Ward. The City's action, as in this case, followed a major controversy with meetings, letters, and protests opposing the proposed housing. The Court found evidence of racially discriminatory purpose in the City's actions, but also held that the City's actions had an illegal, racially discriminatory effect. The Second Circuit, in affirming the lower court ruling, stated:

> The effect of Lackawanna's action was inescapably adverse to the enjoyment of this right [freedom from discrimination in the enjoyment of property rights]. In such circumstances the City must show

> a compelling governmental interest in order to overcome a finding of unconstitutionality. Shapiro v. Thompson, 394 U.S. 618, 634, 89 S. Ct. 1322, 22 L.Ed. 2d 600 (1969).
>
> * * *
>
> Even were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its Black citizens under a severe disadvantage which it cannot justify. 436 F.2d at 114.

In setting forth the elements of what is termed the "mosaic of Lackawanna's discrimination", the Circuit Court focused on "the action of the Planning and Development Board... in reversing its predecessor" and recommendations put forth by that Board "despite the contrary recommendation of its planning expert." Id. at 113. Reversals of policy and failures to adhere to recommendations of planning experts similarly characterize the tortured history of housing plans for Mitchel Field.

Officials in Crow, supra, reneged on a commitment to the development of multi-family housing on a particular tract of land when they discovered that the project for which they had rezoned was to house low income minority citizens instead of the upper-income, "nice", residents they had expected. 332 F. Supp. at 390. Citing Lackawanna, the Court ordered reinstatement of the prior plan and required building permits for the project to issue. Id. at 395.

The Crow court rejected all the County's justifications for refusing to issue the building permits and found that, in the main, those justifications constituted "a planned contrivance to be used in any situation in which public housing was involved." Id. at 390. It wrote:

> [I]t is abundantly clear that, in the absence of supervening necessity, any county action or inaction intended to perpetuate or which in fact does perpetuate the conditions just described cannot stand. Nor can county action or inaction which would thwart their correction be permitted to continue.
> 332 F.Supp. at 392.

In Banks v. Perk, supra, the Court refused to countenance a reversal of public policy which had the effect of confining low-income Black citizens to the racial ghettos of Cleveland. The Court rejected the notion that the reversal of policy was simply an exercise of governmental discretion which may have had an inadvertent discriminatory effect, finding that "local officials may not exercise the normal modicum of discretion if the clear result... is the segregation of low-income Blacks from all-White neighborhoods." 341 F.Supp. at 1180. The Court articulated the legal test as follows:

> Therefore, in the absence of any supervening necessity or compelling governmental interest, any municipal action or inaction, overt, subtle or concealed, which perpetuates or reasonably could

perpetuate discimination especially
in public housing, cannot be tolerated.
Id. at 1180

Despite this clear line of authority, the District Court found that "the preclusion of housing at Mitchel Field does not have a racially discriminatory... effect" [111a-112a]. The primary explanation offered by the Court for this conclusion is its view that "construction of high-rise apartments at Mitchel Field is [not] necessary to dismantle racially segregated patterns of residential housing" [110a]. This completely ignores the fact that cancellation of plans for low-income housing, in itself, has a racial impact because "In Nassau County low-income family housing is occupied predominantly by Blacks" [106a] and because Blacks are disproportionately in need of such housing. Uncontroverted testimony established that Blacks constitute that segment of Nassau County's population with the most severe housing problems and the greatest incidence of poverty. See supra, pp. 23-24. Furthermore, the need for low-income housing is so great that the Bi-County Board has called for the immediate construction of 21,500 low-income subsidized housing units.

The Court's fundamental error, however, is its conclusion that because some racial concentration exists in the vicinity of Mitchel Field, the jettisoning of plans for low-income housing at the Field does not increase the overall pattern of racial segregation throughout the County. The critical

fact remains that Mitchel Field, for the most part, is located in East Meadow, which is 98% white, and Uniondale, which is 91% white. Also, the record shows that those Blacks residing in Uniondale are concentrated in a portion of the community removed from Mitchel Field. See p. 23, supra. Furthermore, all of the plans which called for the construction of housing at the Field uniformly emphasized the need to create a wide range of opportunity in the development of the Field - thereby insuring a racially integrated residential environment.

In assessing the relationship between abandonment of plans for low-income family housing at Mitchel Field and racial segregation, the District Court completely ignores the sorry history of such housing in the region. Only 80 units of publicly assisted family housing have ever been constructed in the Town of Hempstead. All are located in the Inwood section; identified by numerous witnesses as a racial ghetto. The HUD Regional Administrator cut off housing funds to the Town because it refused to build low income family housing in white areas. See pp. 26-27, supra. Had the County pursued its plans for family housing at Mitchel Field, it would have allowed virtually the first low-income family housing in the Town of Hempstead constructed outside the confines of an identifiable racial ghetto. Apparently, the District Court believes that a finding of racially discriminatory effect is unwarranted unless the official action obstructs plans for low-income, minority housing in an all-white neighborhood.

Finally, an essential aspect of the racial effect made out on this record is the unequal treatment afforded Whites and Blacks in the provision of low cost housing. The County and Town have steadfastly advocated and planned for senior citizen housing, which will admittedly be occupied almost exclusively by white citizens, at Mitchel Field. On the other hand, since 1971, the County and Town have abandoned plans for low-income family housing and have announced that no such housing will ever be built there.

The Court brushes aside this glaring instance of unequal treatment, making no ruling concerning its racially discriminatory effect and only concluding that "such actions are not the result of intentional and purposeful discrimination" [112a]. Compare, Hawkins v. Town of Shaw, Miss., supra. The lower court simply did not probe the evidence to determine whether the governmental policies before it had a racially discriminatory effect.

Probably the clearest recent statement of the standard for review in a lawsuit of this type was set forth by the court in Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F.Supp. 1257, 1263 (N.D. Ohio 1973) which said:

> In view of the factual showings of the almost all-white character of the suburbs, the high percentage of Negroes in CMHA housing... and the need for low-

> income housing both on a community and on a metropolitan basis, the refusals or failures to respond to CMHA requests to initiate public housing were intended to and have the effect of excluding Negroes and perpetuating racial segregation contrary to the national housing policy.

Certainly the appellees' action in reversing long standing plans for provision of low-income family housing at Mitchel Field had a clear and discernible racially discriminatory effect.

III. THE JUSTIFICATIONS ASSERTED BY APPELLEES FOR REVERSING PLANS FOR THE DEVELOPMENT OF LOW-INCOME HOUSING AT MITCHEL FIELD CANNOT WITHSTAND SCRUTINY UNDER THE COMPELLING STATE INTEREST TEST

The burden of the Appellants' argument in Point II is that Nassau's action in removing housing from plans for Mitchel Field had a clear, racially discriminatory effect. The cases cited indicated that where such a showing is made, the Court must evaluate the challenged action under a compelling state interest or supervening necessity test. None of the reasons set forth by the appellees for revoking the Mitchel Field low-income family housing plans can withstand this test.

The primary justifications asserted by the appellees are set forth and discussed at pp. 30-36, supra. As noted, the major reason asserted by appellee Caso at trial for the County's action was that Mitchel Field had been purchased for civic, educational and cultural purposes and that housing was incompatible with such purposes [320a-321a]. Yet, the County did not feel itself bound by the "civic, educational and cultural" limitations when it proposed and supported plans for construction of senior citizen housing units and for the large commercial project now slated for the northwest quadrant.

The claims of burden on the local schools verge on the absurd when it is remembered that these claims are advanced

by wealthy school districts with substantial tax rolls and, in the case of East Meadow, empty schools.

The fact that vacant land which, theoretically, might be suitable for development of low-income family housing may exist elsewhere in the County cannot possibly be a compelling justification for obstructing specific plans for such housing on a County-owned parcel. Merely because alternatives to the prior Mitchel Field plan may exist does not constitute a clear and undeniable necessity for reversing the housing element of the plan. This is particularly true where, as here, the County points to potential development on sites involving prohibitive condemnation and demolition costs, or sites far removed from essential services and mass transportation [246a-255a]. In any event, the County proffers this "justification" by pointing at land which it does not own and for which it has never formulated any low-income family housing plans.

The County's approach is all too similar to the government actions criticized in the first Mahaley decision:

> In other words, the refusals of defendant suburbs to negotiate a Local Cooperation Agreement were not within the analogy of one who walks past a drowning person but were more akin to the analogy of one who holds a life preserver

over a drowning person and upon consideration, decides not to drop it.

Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F.Supp. 1245, 1252 (N.D. Ohio 1972) (Lambros, J., dissenting from decision upholding facial validity of local cooperation agreement statute.)

It is little consolation to appellants who have suffered invidious racial discrimination that the County undertook a survey of available land in 1968.

In Mahaley II, supra, 355 F. Supp. 1257, the Court rejected the very justifications for discriminatory government actions which appellees pressed in the District Court, saying:

> The suburban defendants offer no compelling reason to justify their failure to sign a Cooperation Agreement. The defendant suburbs made bald allegations that their failure to act or enter into Cooperation Agreements was not motivated by racially discriminatory reasons. They offered only allegations of no need for low income housing and their fear of a property tax loss. Neither reason was supported by the evidence, and the latter should not be considered adequate or compelling even if proof had been offered.
>
> The evidence indicates a need for additional public housing in the entire county and in each suburb as well.
>
> * * *
>
> The only other argument or rationalization offered for the failure or refusal of the defendant suburbs to enter into a Cooperation Agreement has been an alleged fear that the introduction of tax exempt public housing within a municipality would

> result in a financial loss. However, there was absolutely no evidence introduced to support said allegation. In fact, the evidence was to the contrary. Norman Krumholz, Director of the City Planning Commission of the City of Cleveland, testified that with sound planning and cooperation between a municipal or county planning commission and a housing authority, a plan could be devised for the development of public housing which would not reduce the net revenue to an individual municipality or to the county as a whole.
>
> Even if there were some proof of tax loss, this fact is sufficient.
>
> * * *
>
> The use of these transparent and flimsy rationalizations indicates quite clearly that the conduct of the municipalities was designed to exclude public housing and the Negroes who, obviously will inhabit this type of housing.
>
> 355 F. Supp. at 1266.

It is the appellants' position that to satisfy the constitutional test of compelling or supervening necessity, the appellees, at a minimum, must show that there are overriding planning justifications,* which mandated reversal of the longstanding plans for family housing at Mitchel Field.

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*At the very least the District Court should have engaged in heightened or activated judicial scrutiny of these planning justifications. Borass v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), prob. juris. noted, 94 S.Ct. 234 (1973); Demiragh v. DeVos, 476 F.2d 403 (2d Cir. 1973). The absence of any substantial planning justifications for the County's action indicates that the County's explanation for its action could not have withstood such scrutiny.

Appellees did not meet this burden. On the contrary, every planner involved in this matter, including the County's planning consultant for Mitchel Field, Liu, and the County's own Planning Commission maintained that the only sound and viable plan for Mitchel Field was one which included a minimum of housing opportunities.

The Ninth Circuit has recognized that a planning decision cannot be legitimate if it fails to address itself to the needs of low-income, minority citizens:

> Given the recognized importance of equal opportunities in housing, [citation omitted] it may be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accomodates the needs of its low-income families, who usually -- if not always -- are members of minority groups.
>
> Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City, Calif., 424 F. 2d 291, 295-296 (9th Cir. 1970)

This requirement of legitimate planning justifications constitutes a practical, and perhaps the only available, means for assuring that the valid aspirations of minority citizens will not be frustrated by irresponsible bureaucratic actions shored up by hosts of seemingly neutral official explanations. It also constitutes a means for assuring that these aspirations will not be thwarted by self interested political considerations of local officials.

IV. THE REVERSAL OF PLANS FOR THE DEVELOPMENT OF LOW INCOME FAMILY HOUSING AT MITCHEL FIELD VIOLATES THE FAIR HOUSING LAW

The Federal Fair Housing Law of 1968, 42 U.S.C. 3601 et seq. prohibits local municipal actions that deny minorities access to decent housing or otherwise promote racial residential segregation. Lackawanna, supra; Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971).

The Supreme Court and this Circuit both have recently adopted a broad view of the scope of the Fair Housing Law, Trafficante v. Metropolitan Life Ins. Co., 93 S.Ct. 364 (1973); Otero v. New York City Housing Authority, 484 F.2d 1122 (1973). This Circuit has directed specific attention to the scope of the affirmative obligation of municipal officials to achieve integration in housing. In Otero, this Court stated:

> An authority is barred from using assignment methods which seek to exclude, or have the effect of excluding, persons of minority races from residing in predominantly white areas or of restricting non-whites to areas already concentrated by non-white residents . . . Not only may such practices be enjoined, but affirmative action to erase the effects of past discrimination and desegregate [sic] housing patterns may be ordered. 484 F.2d at 1133.

In Otero, this Circuit accorded a major civil rights law

the generous reading which is necessary to assure a viable, meaningful guarantee of equal housing opportunity to all citizens. The Court recognized that Congress had provided what Mr. Justice Stewart has described as "a complete arsenal of Federal authority" in order to protect minority citizens' civil rights. Jones v. Alfred Mayer, 392 U.S. 409, 417 (1968).

The District Court's extremely narrow reading of the appellees' responsibility to promote racially-integrated housing runs counter to the Supreme Court's statement that the civil rights statutes should be accorded a "sweep as broad as their language". Griffin v. Breckinridge, 403 U.S. 88 (1971). See, also, Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F.2d 1333 (2nd Cir. 1973); and Chance v. Board of Examiners, 458 F.2d 1167 (2nd Cir. 1972).

Under the Fair Housing Law, the federal courts have been particularly sensitive to the impact of governmental decisions on overall patterns of residential segregation in metropolitan areas. See Shannon v. HUD, 346 F.2d 809, 820-821 (3rd Cir. 1970); Blackshear Residents Organization v. Housing Authority of City of Austin, 347 F. Supp. 1138, 1148 (W.D. Tex. 1971); and Garrett v. City of Hamtramck, 335 F. Supp. 16, 22 (E.D. Mich. 1971).

Significantly, the District Court did not even apply the mandate of the Fair Housing Law to the prevailing patterns of racial segregation throughout Nassau County even though the Court itself

recognized that the pattern of Black settlement "has become one of increasing concentration" [103a]. In addition, appellants brought to the Court's attention the uncontroverted testimony that the Department of Housing and Urban Development had already moved against the Town of Hempstead under the Fair Housing Law to terminate federal housing assistance to the Town. HUD considered continued funding a violation of the Fair Housing Law because Hempstead refused to allow construction of low-cost family housing outside areas of minority concentration. At trial, the Regional Administrator of HUD cited the Shannon ruling as authority for his action [529a]. The District Court should also have appreciated the legal significance of the refusal to permit construction of low-income housing for families in an area characterized by a pattern of increasing racial concentration.

V. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE GENERAL SERVICES ADMINISTRATION HAD COMPLIED WITH FEDERAL SITE SELECTION LAWS

Executive Order 11512, Section 2(a)(6), provides that in the choice of a site for a Federal facility, GSA is to be guided by "the availability of low and moderate income housing ..." Section 2(a)(4) states that "consideration shall be given in the selection of sites for Federal facilities to . . . the impact a selection will have on improving social and economic conditions in the area." GSA has promulgated regulations to effectuate the purposes of this Order. The Federal Property Management Regulations now require that adequate housing for low and middle-income employees be available within a reasonable distance from a new site. 41 C.F.R. 101-18.102(d).

GSA also has executed a Memorandum of Understanding with HUD. That Memorandum seeks to implement the affirmative action provisions of the Fair Housing Act of 1968 as well as the Executive Order. The Memorandum states that "advice from regional offices of HUD is to "constitute the principal basis for GSA's consideration of the availability of housing," and that if HUD reports that low-income housing is not available on a non-discriminatory basis, the two agencies are to develop "an affirmative action plan to insure that such housing would be available within six months after the occupancy of any facility."

Without first assessing housing availability in the County, GSA submitted a planned Prospectus for an office building intended to house 2,000 workers to the Office of Management and Budget. By forwarding the Prospectus to OMB, GSA committed itself to an office building at that site. GSA took this action despite the fact that it had not yet received the report from HUD on the availability of low and moderate-income housing in the area. More importantly, it proceeded with work on the federal office building even as appellee Town and County were engaging in activities calculated to restrict housing opportunities for low-income minority citizens at Mitchel Field and in the Town of Hempstead. Even more remarkable, GSA finished work on its Prospectus even as HUD, the agency with which it was required to consult, perceived the civil rights violations implied in appellee Town's housing program and threatened to withdraw funds from the community.

The lower court discusses none of this evidence. Incredibly, it simply cites Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026 (E.D.N.Y. 1972); motion to vacate preliminary injunction denied, No. 71-C-1001 (E.D.N.Y. July 20, 1972), in which the Court interpreted the relevant statutes and Executive Order and found GSA's civil rights activities sorely lacking.

The Brookhaven case involves construction of an IRS facility in the Town of Brookhaven on Long Island. Plaintiffs there sought a preliminary injunction enjoining the occupancy of the

building until adequate low-income housing was made available, or, alternatively, enjoining GSA from disposing of surplus housing units at Suffolk Air Force Base unless such units were made available to low-income persons. In granting plaintiffs' motion for the preliminary injunction, the court cited the housing shortage in Brookhaven and the fact that welfare recipients, as in the instant case, had been placed in motels. The court further noted that GSA had not obtained any meaningful comment from HUD on the availability of housing in the area. In defining the scope of the Executive Order, the court stated:

> It appears to the Court, however, that the Executive Order was intended for the benefit of both employees and non-employee residents of the area, and that it calls for affirmative action, as indeed it was construed to do in the Memorandum of Understanding. 341 F. Supp. at 1030.

In a later order, the court further detailed the duties of GSA pursuant to the Executive Order. Brookhaven II, supra. Denying defendant's motion to dissolve the preliminary injunction, the court emphasized the duty of GSA to consult with HUD before committing itself to actions with low-income housing implications. The court stated:

> [I]n the absence of any specific advice from HUD to GSA, the Court may properly proceed as if HUD had reported that low-income housing on a non-discriminatory basis was inadequate and that therefore an "affirmative action plan" should be developed.

Given the testimony by the Regional Administrator of HUD that he was worried about the civil rights implications of housing practices in the Town, the lower court should have proceeded as though HUD had formally notified GSA that housing opportunities were lacking in the area proximate to the GSA site.

Moreover, the Court should have recognized GSA's independent and heavy responsibilities under the Federal Fair Housing Law. See, e.g., Shannon, supra, and Garrett, supra, and the discussion in Point IV, supra. The District Court fails even to rule on GSA's fair housing obligations [112a]. If this Court is to fully implement the Fair Housing Law, it must surely require the federal government to adhere to a standard of conduct at least as high as that demanded of local governments.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and this cause remanded for the granting of a final judgment in accordance with the claims for relief set forth in the Complaint.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

ABDON ACEVEDO, et al.,

Appellants,

-against-

NASSAU COUNTY, et al.,

Appellees.

----------x

No. 74-1235

CERTIFICATE OF SERVICE

This is to certify that two copies of appellants' brief and one copy of appellants' appendix were served on counsel for each of the appellees on March 1, 1974, as follows:

Service on Joseph Jaspan, counsel for Nassau appellees, and service on Albert Leone, counsel for Hempstead appellees, was accomplished by hand delivering said copies pursuant to agreement to Kevin Rein, a representative of the Nassau County Attorney's Office, at the Clerk's office. Service on Cyril Hyman, counsel for federal appellees was accomplished pursuant to agreement between counsel, by leaving said copies with the Court Clerk's office to be picked up by a messenger.

Dated: March 1st, 1974.

Richard F. Bellman

RICHARD F. BELLMAN